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Supreme Court of the United States

OCTOBER TERM, 1937

No. 594

CALMAR STEAMSHIP CORPORATION,

Petitioner,

against

CHARLES W. TAYLOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

FRANK A. BULL,
Counsel for Petitioner.

CORPORATE PRESS, INC., NEW YORK CITY

Supreme Court of the United States

OCTOBER TERM, 1937

No. .....

CALMAR STEAMSHIP CORPORATION,
Petitioner,
against
CHARLES W. TAYLOR,
Respondent.

PLEASE TAKE NOTICE, that upon the certified copy of the record herein, and upon the annexed petition and brief for petitioner, copies of which are herewith served upon you, I shall apply to the Supreme Court of the United States, at the Supreme Court Building, in the City of Washington, District of Columbia, on the 20th day of December, 1937, at the opening of court, or as soon thereafter as counsel can be heard, for a writ of certiorari in conformity with the prayer of said petition, and for such other relief as may be just.

Dated, New York, N. Y., November 20, 1937.

Yours, etc.,

FRANK A. BULL,
Proctor for Petitioner.

To:
MESSRS. FREEDMAN, GOLDSTEIN & PECHNER,
Proctors for Respondent,
Franklin Trust Building,
Philadelphia, Pennsylvania.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1937—No. .....

CALMAR STEAMSHIP CORPORATION,
Petitioner,
against
CHARLES W. TAYLOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petition of Calmar Steamship Corporation respectfully shows to this Honorable Court as follows:

A.

Summary Statement of the Matter Involved.

This is a petition by Calmar Steamship Corporation, owner of the Steamship *Losmar,* for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decision of that Court (R. 326-31), which affirmed a final decree in admiralty of the United States District Court for the Eastern District of Pennsylvania (R. 315) awarding respondent, a former seaman on the *Losmar,* maintenance and cure for life, in the sum of $7,000.

The suit was brought by respondent (libellant below) to recover damages and maintenance and cure for thrombo angiitis obliterans, commonly called Buerger's Disease, alleged to have been contracted on the *Lasmar* (R. 3-5, 306). Both the District Court and the Circuit Court of Appeals found that respondent's disease was not caused by any negligence of petitioner (R. 311-2, 315, 328), but they thought

it was contracted while he was on petitioner's steamship and allowed him maintenance for the remainder of his life.

The facts of the case are, briefly, as follows:

Petitioner is a Delaware corporation engaged in intercoastal water transportation (R. 3, 7) and owned and operated the steamship *Losmar* (R. 3, 7, 314). Respondent is a seaman who was employed on the *Losmar* as a fireman for a short time prior to his disease becoming apparent (R. 3, 7, 19, 314).

On February 3, 1935, the *Losmar* went into a ship yard at Sparrows Point, Maryland, for regular trip repairs (R. 34, 154, 188, 307) and the crew were paid off on February 4, but respondent remained on shore pay while the repairs were being made (R. 35).

Respondent testified that on Saturday, February 9, 1935, he injured the small toe of his right foot when he walked into a pile of retarders, which had been removed from the center boiler and left on the boiler room floor (R. 19, 21, 24, 33, 35, 70-3). He blamed this alleged accident on the retarders being left in an improper place and the fact that the lights on the ship went out just as he was entering the boiler room (R. 21-2, 31, 72-3). Petitioner's evidence showed that there were no retarders where respondent claimed to have walked into them, that if they had been there it would have been the proper place for them, and that the lights did not go out; but such fact issues are not involved on this petition.

On Monday, February 11, 1935, respondent went to the Marine Hospital at Baltimore (R. 23-4, 33, 35, 290-1) where he had some teeth extracted and received some medication for his right foot, after which he returned to work on the ship (R. 36-7, 291). The abstract from his clinical record at that hospital stated that he complained of an "inflammatory lesion between 4th and 5th right toes." The diagnosis was "Ringworm, right foot" (R. 291).

A few days later respondent again went to the hospital (R. 36) and had the rest of his teeth extracted (R. 37, 291),

and he again returned to the *Losmar* for work (R. 37). The abstract stated that he did not go for further treatment after February 16 (R. 291).

About February 24 (R. 154) respondent sailed with the *Losmar,* arriving at Philadelphia on February 26 (R. 24, 154). Two days later (R. 38-9) he went to the Public Health Service Relief Station at Philadelphia (R. 37) where his condition was diagnosed as boils on the left forearm and neck and "epidermophytosis, toes of both feet" (R. 304-5). Epidermophytosis is a fungus infection found in inflammatory diseases of the skin.

Subsequent to his visit to the Public Health Service, on February 28, respondent signed articles for an intercoastal voyage of the *Losmar* (R. 39), which sailed from Philadelphia on March 3 (R. 154, 217). He continued with his regular work, although a few days out he had the steward treat his foot (R. 26, 221-3, 224-5).

The *Losmar* arrived at the Panama Canal on the evening of March 11 (R. 39, 154, 157, 217). At 12:30 the next day respondent was taken to Gorgas Hospital with his right foot badly infected between the 4th and 5th toes (R. 42, 154-5, 158), and there his ailment was diagnosed as "osteomyelitis, chronic, proximal phalanx right fifth toe with draining sinus" (R. 291-2). On March 27 the fifth toe on his right foot was amputated (R. 42, 292). He remained at Gorgas Hospital until May 4 (R. 43, 291-2, 327), when he started back to the United States on petitioner's Steamship *Alamar* (R. 42).

He arrived at New York and entered the Marine Hospital on Ellis Island on May 13 (R. 45). He remained there under hospital care until August 7, during which time the first diagnosis was made of Buerger's Disease (R. 293). While at this hospital his fifth toe was re-amputated, and later the fourth toe was removed (R. 45, 294).

From Ellis Island he was transferred on August 7 to the Marine Hospital at Stapleton, Staten Island (R.

29, 293), where his right leg was amputated below the knee on September 6 (R. 29, 295). He continued as a patient at Stapleton until October 3, when he was discharged to the out-patient department "to return at intervals for re-examination, and later to be fitted with artificial limb" (R. 30, 75, 293-5, 327). Late in December, 1935, he was fitted for an artificial leg, which he obtained on January 15, 1936 (R. 30, 328).

During the time respondent was at Ellis Island and Stapleton Marine Hospitals he did not tell petitioner of any accident such as he testified to at the trial, and petitioner was unable to find out from him what caused his disease (R. 47, 49, 132-3, 135-6, 269, 271-3, 278, 282-3). Nevertheless petitioner frequently gave him money, even though he had no expenses of maintenance or cure at the various hospitals. Petitioner continued making regular payments to him after he was discharged as an in-patient at Stapleton, and up to March 10, 1936, giving him a total of $487 (R. 45-6, 295-303, 314). These payments were stopped because respondent left New York, without telling petitioner, and retained his attorney to sue for damages in Philadelphia (R. 281, 283).

At the trial each side had three medical experts. They seemed to agree that a trauma (such as respondent claimed on February 9, 1935) would not cause Buerger's Disease (R. 80-1, 87, 118, 127, 133, 138), and the District Court so found (R. 309, 312). However, these experts differed somewhat in their opinions of the effects of a trauma on the disease. They agreed that Buerger's Disease is an inflammatory disease of the blood vessels, the exact cause of which is unknown (R. 55-6, 80, 84, 117-8, 120, 133, 137).

None of them could find any evidence of a traumatic injury in any of the hospital abstracts (R. 78, 121, 135, 140); but respondent's doctors accepted his unsupported statement that there was one, and petitioner's doctors gave more weight to the evidence from the various abstracts.

Respondent's doctors expressed the opinion that his Buerger's Disease could have been "precipitated" or "incited" by a trauma (R. 55, 84), but petitioner's doctors said the pathological findings at Stapleton, which all the doctors considered the real proof of Buerger's Disease (R. 55, 60, 84, 122, 133, 138), showed the disease was of long standing, much longer than since February, 1935 (R. 122, 133, 138). They thought the only connection of a trauma, if there was one, was that it might precipitate *a diagnosis* of existent Buerger's Disease.

Respondent's medical witnesses examined him months after the amputation of his leg: Dr. Seltzer on March 18, and April 20, 1936 (R. 53), 6 and 7 months after; Dr. Kay on April 10, 1936 (R. 80), 7 months after; and Dr. Lowry on June 6 and 9, 1936 (R. 83), 9 months after. At these times the doctors did not treat respondent, but merely made diagnoses of Buerger's Disease based on the history of the case and the hospital abstracts (R. 59-60, 77-8, 82, 89). Dr. Seltzer said he could not diagnose respondent's ailment as Buerger's Disease from his examination alone, but would need the hospital reports; and that respondent had shown no signs of any consequence, so far as the active stage of the disease is concerned, since leaving the Stapleton Marine Hospital (R. 60). Dr. Kay said that on April 10 he found no manifestations of Buerger's Disease. They had all been taken care of by then (R. 82).

The fact that these doctors all examined respondent, on his behalf, after he left the Marine Hospital, but did not treat him nor suggest any treatment that possibly could be given to effect a cure of his disease, shows that they did not know of anything further that could be done to effect more of a cure than he then had.

Respondent's witnesses said he had not been cured of his Buerger's Disease at the time of the trial, as it is incurable (R. 57, 81, 85). They said relapses are common with the disease (R. 58, 81, 86), although it may remain dormant

a long time (R. 81). They expressed the opinion that respondent would require some medical supervision for the rest of his life, and *in the event of a relapse* he would need specialized care (R. 58, 81, 86). Dr. Lowry said he should be examined periodically regardless of whether he showed any indications of the disease (R. 86). Dr. Seltzer and Dr. Kay said that *if* a relapse occurred, gangrene might set in and, *if* the gangrene became incurable, another amputation would be necessary; and that the disease might prove fatal (R. 58, 81).

In short, the testimony of libellant's medical witnesses was that respondent's disease is incurable and at some time in the future he *might* have a relapse, which *might* necessitate another operation or *might* prove fatal; but none of them said when in the future a relapse might occur, nor that one was bound to occur, nor that medical science could cure respondent one iota more than he was cured after he recovered from the amputation of his leg.

District Court Opinion.

The District Court, whose opinion is not reported (R. 305-15), found that respondent was suffering from a progressive disease which was not cured by the amputation of his leg (R. 310, 313, 315) and never could be cured (R. 315), and that there was "a *probability* of the recurrence" of the disease (R. 306), and further "amputations will, *or at least may,* be necessary," with the result that the respondent "will or *may be*" in need of care "for the rest of his life *or for an indefinite time*" (R. 310). The Court also found that petitioner, by paying respondent $487, met its maintenance obligations up to March 10, 1933 (R. 314), which was six months after the amputation of his leg (R. 29, 295), five months after he was discharged from the hospital (R. 293-5), and two months after he was fitted with an artificial leg (R. 30).

Having found that respondent *might* need further care

for the rest of his life or for an *indefinite* time, the Court held that he was entitled to maintenance for life. Its award was based on a speculative life expectancy, as shown by its decision:

> "The libellant is 43 years of age. The expectancy of life at that age is 25.71, but his condition would lessen this. His pay aboard ship was $57.50 with keep. Taking all elements into consideration, including a present value award allowance, we find a fair and reasonable sum for the expense of future care and maintenance to be the sum of $7000.00, for which the libellant should have judgment, with costs." (R. 314)

The Court's holdings was, in substance, that a seaman who is suffering from an incurable disease, in which there may be a relapse or recurrence requiring further medical treatment, is entitled to maintenance until death.

The Circuit Court of Appeals Opinion.

The Circuit Court of Appeals, whose opinion is reported in 92 F. (2d) 84 (R. 326-31), affirmed the District Court in all respects, finding that there was no negligence on the part of petitioner but allowing respondent to recover $7,000 as the present value of life maintenance, on the theory that that is *a reasonable time to effect a cure of an incurable disease.*

In affirming the District Court's award, the Circuit Court of Appeals said:

> "* * * There is no doubt as to the obligation of a vessel and her owner to provide maintenance and cure for a seaman who falls sick or is wounded in her service. * * * The duty is to give proper care to the seaman for a *reasonable time* during which medical treatment *may be expected to effect a cure.* What is a reasonable time depends on the facts of each case. * * *
>
> "As we have indicated, the libellant is suffering from an *incurable disease* contracted while in the ser-

vice of respondent's vessel. This alone would not entitle him to maintenance and care by the respondent for life since *the obligation of the latter ends when it has provided him with the ordinary means of cure which medical science affords.* However, in the present case we have the further fact that the *incurable disease* from which the libellant suffers is of a progressive nature and is very *likely* to produce fresh manifestations *in the future* in other parts of his body. * * * His remaining life is, therefore, a reasonable time during which to provide maintenance and *cure.* It follows under the principles of the admiralty law to which we have referred that he is entitled to the cost of his maintenance and care from the respondent during the remainder of his *life.*" (R. 329-30)

"* * * In this case libellant has elected to claim the present value of the amounts which he may reasonably be expected to have to pay in the future. While this is necessarily but an approximation and may in fact turn out to be more or less than the amount actually required, nevertheless we are satisfied that libellant is entitled to receive the cost of his maintenance and cure on this basis if he desires it and can reasonably establish that cost. It is true that respondent's obligation, if it does not provide maintenance and care itself, is to *reimburse* libellant for his expenditures for these purposes, and is not one for damages. But we see no reason why the obligation to reimburse the cost of maintenance and care in the future may not be liquidated on the basis of a lump sum representing the present value of that cost for the period during which, according to the experience of mankind, libellant may be expected to live. * * *

"Respondent finally urges that the amount allowed by the Court below, $7,000, is not supported by the evidence and is excessive. As to this we can only say that we have carefully reviewed the evidence and are satisfied that the sum is a reasonable present liquidation of what libellant's maintenance and care *may be expected to cost during the remainder of his life.*" (R. 331) (Italics ours.)

B.

Reasons Relied on for the Allowance of the Writ.

1. The decision below is in conflict with the applicable decisions of this Court in *The Osceola*, 189 U. S. 158, and *Chelantis v. Luckenbach Steamship Co.*, 247 U. S. 372.

2. The decision below is untenable and contrary to the great weight of authority, in conflict with the decisions of other Circuit Courts of Appeals and of District Courts in other circuits, and directly contrary to the rule previously laid down by the same Court.

3. The decision below attempts to create a new remedy, similar to Workmen's Compensation, contrary to the general maritime law, and without statutory authority.

4. The decision below, after finding that there was no negligence, nor tort liability of petitioner, imposes on petitioner a liability not assumed under its contract, which amounts to the taking of property without due process of law.

5. Contrary to the holdings of this Court, and of the courts in other circuits, the decision below substitutes death for cure as the measure of liability, and speculates on when a cure will be effected of a disease which it found to be incurable in fact.

6. The decision below has so far sanctioned the District Court's departure from, and extension of, the accepted and usual application of the maritime law of maintenance and cure as to call for the exercise of this Court's power of supervision.

This case does not involve a large sum but it does involve questions of maritime law of great importance to shipowners

and seamen. The decision of the Circuit Court of Appeals places a heavy burden on our merchant marine, and attempts to create a new remedy in addition to maintenance and cure, and compensatory damages under the general maritime law, and the Merchant Marine Act, 1920, Section 33, and to give to seamen of today much greater rights than they, or any other kind of workmen, ever had. The decision appealed from would lead to further conflicts among the circuits which will continue until the question is set at rest and uniformity encouraged, and this important question of the federal maritime law should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of ceriorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its Docket No. 6358, March Term, 1937, Calmar Steamship Corporation v. Charles W. Taylor, and that the decree of the United States Circuit Court of Appeals for the Third Circuit in this case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

CALMAR STEAMSHIP CORPORATION,
By FRANK A. BULL,
Counsel for Petitioner.

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

FRANK A. BULL,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1937—No. .....

CALMAR STEAMSHIP CORPORATION,
Petitioner,
against
CHARLES W. TAYLOR,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 305-15) was rendered under date of December 4, 1936, and has not been printed in the reports.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 326-31) was rendered on September 8, 1937, and is reported in 92 F. (2d) 84.

II.

Jurisdiction.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Third Circuit, affirming the decree of the District Court, is September 8, 1937.

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, United States Code, Title 28, Section 347, and under Article 3, Section 2, of the Constitution of the United States.

III.

Statement of the Case.

Inasmuch as a statement of the case necessarily has been given under heading "A" in the petition, a restatement is omitted here in the interest of brevity.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following respects:

1. In holding that respondent was entitled to maintenance and cure for life.

2. In holding that respondent was entitled to maintenance after he was cured in so far as ordinary medical means extend.

3. In holding that the duration of life is a reasonable time for the cure of a disease which it found to be incurable.

4. In measuring a seaman's maintenance award by elements of damages, i. e., age, life expectancy, and earnings.

5. In enlarging the implied maritime contract of petitioner and allowing respondent damages as maintenance and cure.

6. In taking property without due process of law.

V.

Argument.

Summary of Argument.

The lower courts found that respondent became afflicted with Buerger's Disease while in the service of petitioner, in February, 1935. He received free care and maintenance to October 3, 1935. On September 6, his lower leg was amputated to remove the diseased parts, but his care and maintenance were continued until the stump was healed. At that time nothing further could be done to effect a cure, but petitioner continued making payments to him until after he was fitted for an artificial leg and a reasonable time for him to get accustomed to it,—a year after he left the *Losmar* and petitioner's employ.

The lower courts held that, because of the testimony that respondent should have medical supervision, and might at some time have a relapse, and in that event need another amputation, he was entitled to maintenance for life. They held that petitioner had contracted to pay his maintenance until cured of an incurable disease, by death.

Petitioner's position is that it paid respondent more than it had ever contracted to pay him and more than it was required to pay him by law, and that the decisions below are contrary to the maritime law, for the following reasons:

1. The obligation to pay maintenance and cure does not extend beyond a reasonable time to effect a cure so far as ordinary medical means extend.

2. Respondent was allowed damages or compensation, without negligence on the part of petitioner, rather than reimbursement for actual expenses of maintenance under his seaman's contract.

FIRST POINT.

The obligation to pay maintenance and cure does not extend beyond a reasonable time to effect a cure so far as ordinary medical means extend.

The courts below held that respondent was only entitled to maintenance and cure, which is a contractual right arising out of a contract implied in the maritime law.

Pacific S. S. Co. v. *Peterson* (1928), 278 U. S. 130, 139;
Marshall v. *International Mercantile Marine Co.* (2 C. C. A., 1930), 39 F. (2d) 551, 553;
Cresci v. *Standard Fisheries, et al.* (D. C. Cal., 1925), 7 F. (2d) 378.

Originally it was thought by many admiralty judges that the right to maintenance and cure, being an incident to the service contract between the shipowner and the seaman, would last only so long as the contract and wage relationship continued, i. e., until the end of the voyage.

The Ben Flint (D. S. Wis., 1867), 1 Biss. 562, 568-9, Fed. Cas. No. 1299;
The J. F. Card (D. C. Mich., 1890), 43 Fed. 92;
The Tammerlane (D. C. Cal., 1891), 47 Fed. 822, 825;
Cornell Steamboat Co. v. *Fallon* (2 C. C. A., 1910), 179 Fed. 293, 294.

A very good review of the doctrine, as originally applied, appears in *The City of Alexandria* (D. C. N. Y., 1883), 17 Fed. 390, 394-5.

The leading case on the subject of maintenance and cure is *The Osceola* (1902), 189 U. S. 158, 175, where this Court said:

> "The vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

Later, however, following some of the earlier decisions, the courts generally took the view that maintenance and cure should not terminate immediately the voyage ended, but should continue for *a reasonable time thereafter.*

In *Chelantis* v. *Luckenbach SS Co.* (1918), 247 U. S. 372, 379, this Court said:

> "* * * and a seaman * * * could recover * * * only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, * * *."

In *The Bouker No. 2* (2 C. C. A., 1917), 241 Fed. 831, 835, cert. den. 245 U. S. 647, the Court said:

> "We hold that * * * the duty of the ship and owner persists for a reasonable time after the termination of voyage and wage relation. Of course it must begin before such termination."

After extending the duration of the obligation, it became necessary to determine what a reasonable time after the end of the voyage would be. The measure uniformly applied, until the decision appealed from, was the time necessary to effect a cure so far as ordinary medical means extend, or the time during which medical treatment might be expected to effect a cure. Indeed, such a rule was approved as early as 1832 in *Reed* v. *Canfield*, 1 Sumn. 195, 202, Fed. Cas. No. 11641, where Judge Story said:

> "The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the

> ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is, what expenses have been virtually incurred for the cure."

In *Skolar* v. *Lehigh Valley R. Co.* (2 C. C. A., 1932), 60 F. (2d) 893, 895, the Circuit Court of Appeals for the Second Circuit said that the shipowner's duty is only

> "to give proper care for a reasonable time during which medical treatment *may be expected to effect a cure.*" (Italics ours.)

In *The Point Fermin* (5 C. C. A., 1934), 70 F. (2d) 602, 604, it was said that maintenance should continue for a reasonable time after the seaman left the hospital and until it became apparent that the injury could not be benefited by further treatment.

In *The Pochasset* (1 C. C. A., 1924), 295 Fed. 6, 10, the Court held that the shipowner was not liable for maintenance and cure,

> "Because the evidence does not warrant a finding that a further operation would be reasonably likely to effect a cure or substantial improvement in the appellant's condition."

See also:

> *The Mars* (E. D. Pa., 1906), 145 Fed. 446;
> *The Lizzie Frank* (D. C. Ala., 1887), 31 Fed. 477, 480-1;
> *The C. S. Holmes* (D. C. Wash., 1913), 209 Fed. 970, 975;
> *McCarron* v. *Dominion Atlantic Ry. Co.* (D. C. Mass., 1905), 134 Fed. 762;
> *Peterson* v. *The Chandos* (D. C. Ore., 1880), 4 Fed. 645.

The phrase "maintenance and cure" is not quite descriptive of the obligation imposed by the shipowner's contract.

The "cure" referred to is not a complete cure whereby a seaman will never again need any medical treatment or services, but is that stage in his treatment where nothing more can be done for him at the time, by ordinary medical means and skill, to effect a complete cure. It is generally understood to mean "care" by way of medical services and treatment, with a view to effecting such cure as is reasonably possible.

> "The word 'cure' is used in its original meaning of care, and means proper care of the injured seaman and not a positive cure which may be impossible." *The Mars* (3 C. C. A., 1907), 149 Fed. 729, 731.

See also:

> *The Pochasset* (1 C. C. A., 1924), *supra;*
> *Cortes* v. *Baltimore Insular Line* (2 C. C. A., 1931), 50 F. (2d) 22, 23;
> *The Bouker No. 2* (2 C. C. A., 1917), *supra;*
> *Skolar* v. *Lehigh Valley R. Co.* (2 C. C. A., 1932), *supra;*
> *The Atlantic*, Abb. Adm. 451.

In the instant case, in which a writ of certiorari is sought, the court below recognised that the obligation would be to furnish care, and not a positive cure which might be impossible; and that the duty to furnish proper care continues only for a reasonable time during which medical treatment may be expected to effect a cure (R. 329-30). However, after having stated the true doctrine of the maritime law as laid down by so many courts, including the same court in earlier cases, it held that petitioner's obligation would be measured by respondent's age, life expectancy and earnings, and would continue until his death rather than until his cure was effected within the power of science. The evidence in the case clearly showed that the respondent was cured in so far as medical science was capable of effecting a cure, but that

there would always be the possibility of a relapse, and if a relapse occurred, there would be the further possibility of other amputations.

No one could say, and respondent's witnesses did not testify, that a relapse would occur, that a further amputation would be necessary, or that respondent would necessarily ever need specialized care to effect a cure of a condition which existed at the time of the trial. If we disregard the incurable nature of the disease, it would seem clear that one year was a reasonable time in which to effect any cure possible; and the evidence clearly shows that no further treatment at the time would benefit or have a tendency to effect a cure of respondent, but that *he was cured* within the meaning of the phrase "maintenance and cure."

After an exhaustive search we have been unable to find any other decision in which a court has measured the reasonable time for maintenance and cure by a seaman's life, nor any case in which it has been held that maintenance and cure would extend until death because the disease was incurable. On the other hand there are many cases of sound reasoning and recognized authority holding that there is no obligation to pay maintenance for life, nor for an indefinite period.

In *Raymond* v. *The Ella S. Thayer* (D. C. Cal., 1887), 40 Fed. 902, 904, "cure" was held to signify

> "the ordinary medical assistance and treatment in cases of injury or acute disease, for a reasonable time. The ship is not bound to pay for his (the seaman's) medication, for the cure of a chronic disorder, for an indefinite length of time."

See also:

Skolar v. *Lehigh Valley R. Co., supra;*
Meyer v. *Dollar SS Line* (D. C. Wash., 1930), 43 F. (2d) 425, 426.

Indeed, the decision of the Court below is not only contrary to the decisions of the courts of all other circuits

in which the question has been considered, but is in direct conflict with its own prior statement of the law in *The Kenilworth* (3 C. C. A., 1906), 144 Fed. 376, 378, where it said:

> "But if it be assumed that the liability in this instance continued after the completion of the voyage, yet the claim in question, as shown by the proofs, * * * is for expenditures * * * which were made when the cure had been completed, at least so far as the ordinary medical means extend."

In the same case the District Court for the Eastern District of Pennsylvania (137 Fed. 1003, 1009) said:

> "So far as possible, indeed, it appears from the slender evidence on the subject that the libellant has already been cured in a certain sense. That is to say, while he is no doubt permanently injured, nothing further can be done for him by medical or surgical skill."

In *Eckert, Jr.* v. *Socony-Vacuum Oil Co.* (E. D. Pa.), 1937 A. M. C. 636, 639, District Judge DICKINSON, who had previously decided the instant case in the District Court, said in regard to maintenance and cure:

> "Logically however it ends with the end of the voyage. It has been extended however to include what is necessary to effect a cure. Here the libellant received hospital treatment and was discharged. Following this he settled in full for his cure and maintenance claim and executed a release. * * * Surely the ship's obligation ended. If it did not, it would never end."

Judge DICKINSON seems to have overlooked his holding that this respondent's maintenance would never end until death, which we submit is contrary to the law as it has been laid down by this Court and by all other courts. We believe that the rule was correctly stated in *The C. S. Holmes*,

supra, that the duty to effect a cure so far as possible by ordinary medical means

> "does not include * * * treatment which extends after a *cure has been as nearly effected as is possible* in a particular case." p. 975. (Italics ours.)

The courts below erroneously applied the word "cure" in its strict sense, and held that only death could cure an incurable disease. This is in direct conflict with the great weight of authority, other courts having uniformly held that, in the phrase "maintenance and cure," it means *care for a reasonable time during which treatments are administered, and may be expected, to effect such cure as ordinary medical means afford.*

The courts below found that respondent's disease is incurable, which is a finding that medical science cannot furnish a complete cure. Respondent's own medical witnesses conceded they could not cure him, and there was no evidence that anyone could do more than had been done to cure him. When he stopped accepting payments from petitioner he was cured so far as medically possible. "The evidence does not warrant a finding that a further operation would be reasonably likely to effect a cure or substantial improvement" in his condition (*The Pochasset, supra*), and there was no evidence that any other treatment could be expected to.

> "No case, I think, carries the doctrine of maintenance so far as this, and it is obvious that no such indefinite liability can properly be imposed upon the ship. * * * it might be equivalent to *support during life*, and even in a case of great hardship this would be out of the question." *The Kenilworth*, 137 Fed. 1003, 1009. (Italics ours.)

SECOND POINT.

Respondent was allowed damages or compensation, without negligence on the part of petitioner, rather than reimbursement for actual expenses of maintenance under his seaman's contract.

In a trial *de novo,* the Circuit Court of Appeals approved the decree of the District Court without pointing out any evidence to support it, saying that it was satisfied that the sum "is a reasonable present liquidation of what libellant's maintenance and care *may be expected* to cost during the remainder of his life" (R. 331). There was no evidence as to how long respondent's life would last, nor how much his future maintenance would cost him. The only evidence was of his past expenses (R. 31-2).

There was no evidence that he could not earn his expenses, nor any part of them, in the future.

To find the basis of the award, we must examine the District Court's opinion which shows that it was not the cost of maintenance, but respondent's age, life expectancy, and last rate of earnings (R. 314). These are elements of *damages,* but not of maintenance and cure. The Circuit Court of Appeals conceded that the award was "arrived at in exactly the same way as damages for the loss of future earnings are computed" (R. 331). An award of damages based on a speculative life expectancy and earnings cannot be made valid by calling it maintenance and cure.

The duty to furnish maintenance and cure is a duty to maintain and care for the seaman during a reasonable time to effect a cure, insofar as ordinary medical science is capable, or to repay him any necessary expenses he has been put to obtaining such maintenance and care elsewhere. Thus a money allowance is only for a reimbursement of necessary expenses actually incurred by the seaman.

The Kenilworth (3 C. C. A., 1906), 144 Fed. 376, 378, affirming 137 Fed. 1003;

The Mars (E. D. Pa., 1906), 145 Fed. 446;
Reed v. *Canfield* (C. C. Mass., 1832), 1 Sumn. 195, 202, Fed. Cas. No. 11641.

In *Cortes* v. *Baltimore Insular Line* (1932), 287 U. S. 367, 373-4, this Court said that failure to furnish maintenance and cure may amount to a tort, but the seaman's remedy where it has been procured is *for the outlay.*

The Circuit Court of Appeals recognized that the obligation is one of reimbursement (R. 331), but then approved an award based on elements of damage without evidence of necessary expense. There cannot be an award without evidence of the seaman's actual expenditures. *The West Irmo* (D. C. N. Y.), 1936 A. M. C. 614. When there are no such expenditures for maintenance or cure, there is nothing to reimburse, and no liability of the employer.

The Balsa (3 C. C. A., 1926), 10 F. (2d) 408;
The Santa Barbara (2 C. C. A., 1920), 263 Fed. 369, 371;
Fleischman v. *U. S.* (D. C. N. Y., 1934), 7 F. Supp. 373, 376.

There was not a scintilla of evidence of any expense of care that respondent will have in the future. The evidence was that he had been at marine hospitals where he had no expenses (R. 289), and that he was to return to the Stapleton Marine Hospital periodically for medical supervision (R. 295). If he should have a relapse, his treatment and maintenance would also be without expense to him. There cannot be evidence of expenditures which may or may not be incurred in the future. The speculative "future care and maintenance" contemplated by the Court may never materialize and there will be nothing for which to reimburse respondent.

The courts below confused maintenance and cure with

the statutory obligation to pay workmen's compensation. The District Court said:

> "It is wholly an independent doctrine with which the law of negligence has nothing to do. It is somewhat akin to the principle on which the workman's compensation statutes are based. * * * Just as the Workman's Compensation Acts place part of the personal injury damage upon the employer so likewise the admiralty law imposes upon ship and owners an obligation for the cure and maintenance of injured seamen. The obligation is imposed merely because of the injury, not because either employer or ship has contributed to its incurrence by any act of their own." (R. 312)

The Circuit Court of Appeals approved an award on this principle, measured by age, life expectancy, and earnings. Attempts to obtain a seamen's compensation statute, similar to the Longshoremen's and Harbor Workers' Compensation Act, have failed largely because of opposition of the seamen themselves, who prefer the benefits of the Jones Act (Merchant Marine Act, 1920, § 33) coupled with maintenance and cure. Without legislative authority the courts below did allow respondent compensation for illness, rather than reimbursement of expenses.

To allow as maintenance and cure expenses which a seaman may or may not have to pay, depending on the future course of his injury or disease and the length of his life, is to allow damages which are recoverable only in the case of the shipowner's negligence. If respondent in this case should recover the $7,000 awarded to him by the courts below, and should die shortly thereafter, it is clear that the greater part of that award would not be reimbursement of expenses, but would become *damages*. The Circuit Court of Appeals said the award was "an approximation and may in fact turn out to be more or less than any amount actually required" (R. 331), but it thought it had the right to make petitioner

pay it even if it should "in fact turn out to be" much more. It is an allowance of what, in large part, will be pure *damages* if respondent's disease proves fatal, as some of his experts testified (R. 58, 81):

> "Sickness * * * may occasion a * * * permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred * * *. They are not in any just sense liable for consequential damages." Story, J., quoted by this Court in *The Osceola, supra*, p. 172.

Conclusion.

It is respectfully submitted that a writ of certiorari should be granted so that this Court may review the decision of the United States Circuit Court of Appeals for the Third Circuit because of the importance of the question involved, and to the end that the maritime law may be uniformly applied, and the courts in the various circuits may be in accord with the holdings of this Court.

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